is plainly within the scope and ambit of the enabling legislation, namely, s 8 of the principal Act, and nothing more need be said about the point.

As for the allegations of fact, having regard to the decision of the Federal Court in *Karam Singh* v *Menteri Hal Ehwal Dalam Negeri, Malaysia*,[4] it is not open to me to consider either the question whether there was reasonable cause to make the detention order or the protestations of innocence of the applicant.

I would conclude by quoting the following passage from the judgment of Tan Sri Abdul Hamid Ag LP in the recent case of *Minister for Home Affairs, Malaysia & Anor* v *Karpal Singh*[5] when speaking for the Supreme Court:

> In other words, reasonable cause is something which exists solely in the mind of the Minister of Home Affairs and that he alone can decide and it is not subject to challenge or judicial review unless it can be shown that he does not hold the opinion which he professes to hold.

In the result, the application must be and is dismissed.

Application dismissed.

Solicitors: *Chooi Shee Hong & Gan.*

Reported by *Ng Sheau Jiuan*

Low Thim Fatt v Public Prosecutor

HIGH COURT (KUALA LUMPUR) – FEDERAL TERRITORY CRIMINAL APPEAL NO CR 52-54 OF 1986
ZAKARIA YATIM J
12 NOVEMBER 1988

Criminal Procedure – Identification at identification parade made after prosecution witness had opportunity to see accused at police station – Whether evidence of identification vitiated

Criminal Procedure – Accused elected to remain silent at close of prosecution case – No witnesses called for defence – Trial judge disallowed defence counsel to make further submission after defence was called – Whether defence counsel entitled to make further submission

Criminal Procedure – Sentencing – Ten years' imprisonment and five strokes of whipping for robbery offence – Whether sentence manifestly excessive – Penal Code (FMS Cap 45), ss 34, 392 & 397

The appellant and two other persons were jointly charged in the Sessions Court with three offences of robbery under ss 392, 397 and 34 of the Penal Code (FMS Cap 45). The appellant was subsequently convicted and sentenced to ten years' imprisonment and five strokes of whipping on each charge. The sentences of imprisonment were ordered to run concurrently but to run consecutively with an earlier sentence passed by the court in respect of another charge. The appellant appealed against his conviction and sentence. The main grounds of his appeal were: (a) the identification parade where PW2 (a prosecution witness) identified the appellant was irregular because, before PW2 attended the identification parade, she was asked by the police to peep through the glass in the door to see whether the appellant was the one who pointed the gun at her; (b) the learned president was wrong in law in that once the defence was called and the appellant elected to remain silent, the learned president did not allow counsel for the appellant to make a submission on the totality of the evidence as a whole and held that the submission at the close of the prosecution case had sufficed; (c) the sentence passed by the learned president was excessive and that she erred in law when she ordered that the sentences were to run consecutively with an earlier sentence passed by the court in respect of another charge.

Held, dismissing the appeal:

(1) The identification of the appellant at the identification parade after PW2 was asked to peep through the door to confirm that it was the appellant who pointed the gun at her was highly irregular. Since PW2 had the opportunity to see the appellant beforehand, the evidence of her subsequent identification at the parade was vitiated. However, there is nothing in the evidence to show that the identification of the appellant by two other prosecution witnesses was improper.

(2) The learned president was right in refusing to allow counsel to make any further submission after the defence was called.

(3) Bearing in mind all the mitigating factors on the one hand, the public interest on the other, and all the circumstances in this case, the sentence passed by the learned president was not manifestly excessive. The learned president rightly applied the deterrence principle in passing sentence in this case. The order that the sentences of imprisonment were to run consecutively from the existing sentence in respect of another charge is set aside since the conviction and sentence on that charge was quashed.

Cases referred to

1 *Chang Kim Siong* v PP [1968] 1 MLJ 36 (folld)
2 *Wong Heng Fatt* v *PP* [1959] MLJ 20 (folld)
3 *Ng Hoi Cheu & Anor* v *PP* [1968] 1 MLJ 53 (not folld)
4 *PP* v *Sanassi* [1970] 2 MLJ 198 (folld)
5 *PP* v *Lee Tak Keong* [1989] 1 MLJ 307 (refd)

Legislation referred to

Penal Code (FMS Cap 45) ss 34, 392, 397

C Sequerah for the appellant.
Cik Siti Zainab Omar (Deputy Public Prosecutor) for the Public Prosecutor.

Cur Adv Vult

Zakaria Yatim J: The appellant and two other persons were jointly charged in the Sessions Court with three offences of robbery under ss 392, 397 and 34 of the Penal Code. The three charges are as follows:

> *Tuduhan Pertama*
> Bahawa kamu pada 28/6/1984, jam lebeh kurang 10.30 pm, di rumah No 145, Jalan Peel, Cheras, dalam Wilayah Persekutuan, Kuala Lumpur, bersama-sama seorang yang maseh bebas, dengan niat yang sama, telah melakukan samun ka atas seorang penama Chee Hai Piau KP 4445391(B), di atas barang, wang tunai $400, Kad kenalan 4445391 kepunyaan Chee Hai Piau, bag James Bond berharga $100, sebuah kereta Volvo WAJ 358 berharga $36,000,

yang bernilai kesemuanya $36,500, dan semasa melakukan samun tersebut, kamu telah bersenjatakan dengan senjata yang merbahaya, iaitu sepucuk pistol dan 3 pisau, dan dengan itu kamu telah melakukah satu kesalahan yang boleh dihukum di bawah seksyen 392 & 397 Kanun Keseksaan dan di baca bersama dengan seksyen 34 Kanan Keseksaan.

Tuduhan Yang Kedua
Bahawa kamu pada 28/6/1984, jam lebeh kurang 10.30 pm, di rumah No 145, Jalan Peel, dalam Wilayah Persekutuan, Kuala Lumpur, bersama-sama seorang maseh bebas, dengan niat yang sama, telah melakukan samun ka atas saorang penama Chee Yoke Fong KP 5167430 (B), di atas barang wang tunai $150, sautas rantai leher emas dengan pandent, dua gelang tangan emas, 3 cincin emas berharga $1,000 yang bernilai kasemuanya $1,150, dan semasa melakukan samun tersebut, kamu telah bersenjatakan dengan senjata yang merbahaya, iaitu sapucok pistol dan tiga pisau, dan dengan itu kamu telah melakukan satu kesalahan yang boleh di hukum di bawah seksyen 392 & 397 KK dan di baca bersama dengan seksyen 34 KK.

Tuduhan Yang Ketiga
Bahawa kamu pada 28.6.1984 jam lebih kurang 10.30 pm di rumah No 145, Jalan Peel, Cheras, dalam Wilayah Persekutuan, Kuala Lumpur, bersama-sama seorang yang masih bebas, dengan niat yang sama, telah melakukan samun ke atas seorang penama Chee Mok Fui KP 2297806(B), di atas barang; wang tunai $1,100, 3 Korean ginseng berharga $3,500 lima keping cek kosong bernombor JP553830-34, yang bernilai kesemuanya $4,600 dan semasa melakukan samun tersebut, kamu telah bersenjatakan dengan senjata yang merbahaya, iaitu supucuk pistol dan 3 pisau, dan dengan itu kamu telah melakukah satu kesalahan yang boleh dihukum di bawah seksyen 392 and 397 Kanun Keseksaan dan di baca bersama dengan seksyen 34 Kanun Keseksaan.

At the trial, only the appellant and the second accused were present. Both claimed trial to the three charges. At the end of the trial the learned president, Puan Rahmah Hussein, found both of them guilty on the three charges. The appellant was convicted and sentenced to ten years' imprisonment on each charge. The sentences of imprisonment were ordered to run concurrently but to run consecutively with the existing sentence. The appellant was also ordered five strokes of whipping on each charge which means that he was sentenced to fifteen strokes of whipping in respect of all the three charges.

The appellant now appeals against the conviction and sentences.

Briefly, the facts are as follows. On 28 June, 1984, at about 10.30 pm the complainant (PW3) and members of his family were in their house at No 145, Jalan Peel, Cheras. While PW3 was about to go to sleep he heard someone outside the house calling his brother's name, 'Ah Kow'. He went to open the side door. Four persons rushed into the house. Three of them were armed with pistols and one was armed with a knife. The person who was armed with the knife was carrying nylon ropes. The appellant was one of the three persons armed with pistols. The appellant and the three other persons tied PW3's hands at the back. They also tied the hands of members of his family, namely, his father (PW4), his mother (PW5), his brother (PW8), his sister (PW2) and his sister-in-law. Then they ransacked the house and took away jewellery, money, a few cheques, three boxes of Korean ginseng, a James Bond bag, and a Volvo car registration number WAJ 358.

The appellant's main ground of appeal is that the identification parade where PW2 identified the appellant was irregular because, before PW2 attended the identification parade, she was asked by the police to peep through the glass in the door to see whether the appellant was the one who pointed the gun at her. Mr C Sequerah, counsel for the appellant, submitted that the identification of the appellant at the identification parade by PW2, PW4 and PW8 was unsatisfactory. He referred to PW2's evidence that she was asked to peep through the door to see the appellant before she attended the identification parade.

In my opinion the identification of the appellant at the identification parade after PW2 was asked to peep through the door to confirm that it was the appellant who pointed the gun at her, was highly irregular. PW2 should be prevented from seeing the appellant before he was paraded with the other persons: see *Sarkar on Evidence*, 13th Ed, p 102. Since PW2 had the opportunity to see the appellant beforehand, the evidence of her subsequent identification at the parade was vitiated: *Chang Kim Siong* v *PP*.[1] PW2's evidence on the identification of the appellant could not therefore be taken into consideration.

Mr Sequerah submitted that the identification of the appellant by PW4 and PW8 were unsatisfactory. I agree with Mr Sequerah in so far as PW4 is concerned. It must be noted that PW4 was seventy-three years old. In his evidence he admitted that he was unable to identify any of the robbers due to his poor eyesight. He added that he could not see clearly without his glasses. According to him, during the robbery he was not wearing his glasses. With regard to PW8, from the evidence, he made a positive identification of the appellant. He said the appellant pointed a gun at him. He saw the gun. The appellant was about one to two feet away from him. At the identification parade PW8 identified the appellant. Before the identification parade he did not see the appellant at the police station. I find nothing in the evidence that the identification of the appellant by PW8 at the identification parade was improper. PW8 also identified the appellant in court. Another person who made a positive identification of the appellant is PW3. He was the person who opened the side door. He identified the appellant at the identification parade and in court. I also find nothing in the evidence to show that the identification of the appellant by PW3 was improper. PW3 did not see the appellant at the police station before he identified the appellant at the identification parade. The learned president, in her grounds of judgment, relied on the evidence

of PW2, PW3 and PW8 on the question of identification. Although she was wrong in relying on the evidence of PW2, I do not think that her finding that the 'third accused was... positively identified during the identification parade...' should be disturbed because she was also relying on the evidence of PW3 and PW8. From the evidence it is clear that the appellant was positively identified by PW3 and PW8.

The appellant's next ground of appeal is that the learned president was wrong in law in that once the defence was called and the appellant elected to remain silent, the learned president did not allow counsel for the appellant to make a submission on the totality of the evidence as a whole and held that submission at the close of the prosecution case had sufficed. From the notes of evidence, I find that at the end of the case for the prosecution, counsel for the appellant made his submission of no case to answer. The learned president found that the prosecution had made out a prima facie case against the appellant. The three alternatives were explained to the appellant and he elected to remain silent. His counsel told the court that no witnesses would be called for the defence.

In my opinion the learned president was right in refusing to allow counsel to make any further submission after the defence was called. If counsel for the appellant was allowed to make a submission he would have nothing new to say except to repeat his submission at the close of the case for the prosecution. The defence had not adduced any evidence in order to raise any reasonable doubt in the prosecution case. The appellant did not even make a statement from the dock. Even if he had made a statement from the dock his statement cannot be regarded as evidence. In *Wong Heng Fatt* v *PP*,[2] Smith J held that the appellant had no right to make any submission whatever after making a statement from the dock since he had not given evidence. Chang Min Tat J, as he then was, in *Ng Hoi Cheu & Anor* v *PP*[3] disagreed with Smith J and held that a statement from the dock is evidence. Chang Min Tat J, however, decided in that case that although the president refused to allow counsel to make a submission at the end of the case for the defence no failure of justice had been occasioned. Chang Min Tat's view that a statement from the dock was evidence was not followed by Sharma J in *PP* v *Sanassi*.[4] In that case Sharma J agreed with Smith J. The learned judge decided that an accused person had a right to make an unsworn statement from the dock but such a statement did not constitute evidence. I am inclined to agree with the decisions of Smith J and Sharma J. Following the decision of Smith J, since there is no evidence adduced by the defence in the present case counsel for the appellant was not entitled to make a submission. The learned president was therefore right in refusing to allow counsel for the appellant to make any further submission.

The appellant's other ground of appeal is that the sentence passed by the learned president was excessive bearing in mind the mitigating factors pleaded by his counsel. The appellant also stated in his petition of appeal that the learned president erred in law when she ordered that the sentences were to run consecutively to an earlier sentence passed by the court in respect of another charge.

On the question of sentence the court must bear in mind that the appellant had committed a vicious crime. When the robbery was committed at the complainant's house, the appellant was armed with a pistol. His three other friends were also armed with pistols and a knife. The learned president was right when she stated in her grounds of judgment that this type of crime is now very rampant: see *PP* v *Lee Tak Keong*.[5] The public interest should be protected and in order to protect the public interest a deterrent sentence must be passed. In this case the crime was premeditated. The learned president had indeed passed a deterrent sentence in this case. In her grounds of judgment, she said, 'I have to pass a deterrent sentence in this case as this sort of offence is now very rampant in this country and in this case, the whole family was put in fear.' In passing a deterrent sentence, the learned president took into consideration the mitigating factors pleaded by the appellant's counsel as well as the submission made by the prosecuting officer.

In my opinion, bearing in mind all the mitigating factors on the one hand and the public interest on the other, and all the circumstances in this case, the sentence passed by the learned president was not manifestly excessive. The learned president, after considering all the mitigating factors in this case, rightly applied the deterrence principle in passing sentence in this case. The order that the sentences of imprisonment were to run consecutively from the existing sentence in respect of another charge is set aside since the conviction and sentence on that charge was quashed by KC Vohrah J (see FTCA 52-39-86). I therefore order that the sentences in the present case are to run concurrently from the date he was convicted of the three charges in the Sessions Court.

In the circumstances, this court will not disturb the order of the learned president in convicting the appellant in respect of the three charges and the sentences passed by her on the appellant except that the term of imprisonment is to run concurrently from the date of conviction.

The appellant's appeal against conviction and sentence is therefore dismissed.

Appeal dismissed.

Solicitors: *CL Sequerah & Co.*

Reported by *Ng Sheau Jiuan*